No. 78-1742

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

LOUIS WOLF,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570,

Attorneys for Respondent.

BERNARD CAREY,
State's Attorney of Cook County, Illinois,,
500 Richard J. Daley Center,
Chicago, Illinois 60602
(312) 443-5496
MARCIA B. ORR,
JOAN S. CHERRY,
Assistant State's Attorneys,
Of Counsel.

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INDEX

AUTHORITIES CITED

CITATIONS

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OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District, is reported as *People* v. *Albert Berland, et al.*, 52 Ill. App.3d 96, 376 N.E.2d 181 (1st Dist. 1977). The opinion of the Illinois Supreme Court, reversing the judgment of the Illinois Appellate Court, is reported as *People* v. *Albert Berland, et al.*, 74 Ill.2d 286, 385 N.E.2d 649 (1979).

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for a Writ of Certiorari. However, as treated more fully within the following argument, the respondent does not believe that the petitioner has shown any good reason for this court to exercise its sound judicial discretion to grant his Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner received the effective assistance of counsel where counsel was privately retained, the petitioner's defense at trial did not conflict with that of the codefendant and there is no showing that a different result would have obtained had the petitioner and the codefendant procured separate counsel.

2. Whether the prosecution's disclosure of the identity of a state's witness under two different names at the same address complied with the Illinois discovery rules and this Court's decision in *Brady* v. *Maryland*, especially where the record shows that the defense always knew the identity of the witness.

STATEMENT OF THE CASE

The petitioner, Louis Wolf, was convicted of the crime of arson with intent to defraud an insurer in violation of Illinois Revised Statutes (1969), ch. 38, sec. 20-1(b). He was sentenced to serve a term of 1½ to 4½ years in the Illinois State Penitentiary and was ordered to pay a fine of $10,000. Tried and convicted with Petitioner Wolf was a codefendant, Albert Berland.

THE PURCHASE OF THE SUBJECT PROPERTY

The subject premises in the instant case, a partially occupied, multi-unit, three story, dilapidated apartment building, located at 715 South Lawndale Street, in Chicago, Illinois, was purchased by petitioner's codefendant, Berland for $18,000 in 1966. On November 19, 1969, the building was partially consumed and rendered permanently damaged in an arson fire.

Both the petitioner and Berland were involved in the building's purchase. During the purchase negotiations, Berland introduced petitioner to the seller as the prospective buyer, and represented himself to be the broker. (People's Exhibit No. 3 at 118, 119; People's Exhibit No. 5 at 146; R. 465, 477, 478[1] Petitioner testified that when the original contract was made to purchase the property, he contacted the owner and purchased the property alternatively, in his name or in the name of his nominee. (R. 477-478)

Both the petitioner and Berland were involved in the chain of title to 715 South Lawndale. At one point the beneficiary of the trust was listed as "Fred Cooper." (People's Ex. No. 5 at 68; see also People's Ex. No. 14) "Fred Cooper" was an alias used by Albert Berland. (People's Ex. No. 5 at 70) Significantly, Cooper's address was given as 1614 South Kedzie and 2840 North Broadway. (People's Ex. No. 14) Both of these locations were in fact business addresses of, petitioner Louis Wolf. (People's Exhibit No. 4, at 56; People's Exhibit No. 3, at 72, 75)

In addition, for a period of time, the name William Berke appeared as the beneficiary to the trust in which was placed the title to 715 South Lawndale. (People's Ex. No. 5 at 143)

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[1] R. designates the transcript of record. R. C designates the common law record. People's Exhibit refers to those exhibits introduced into evidence at trial by the People, the respondent here. Pet. Post-Trial Exhibit refers to those exhibits introduced into evidence during the arguments on petitioner-defendant's post-trial motions.

William Berke was petitioner's nephew. His name appeared as beneficiary as a result of a loan made by petitioner to Berland. As collateral for this loan, Berland named Berke as beneficiary. (People's Ex. No. 5, at 143; People's Ex. No. 2, at 43; R. 503-5)

The petitioner was heavily involved with Berland in the management of and collection of rents from 715 South Lawndale. Soon after the building became Berland's property petitioner Wolf offered his services to find good tenants for Berland, and to collect rents. (People's Ex. No. 5, at 65, 66)

From September, 1969, until the fire in November, 1969, petitioner again lent his services to Berland at Berland's request. (People's Ex. No. 8 at 298; People's Ex. No. 5, at 64). Petitioner and petitioner's employee attempted to collect the rents from 715 South Lawndale. (People's Ex. No. 5, at 126, 66) Petitioner would also examine the building's physical condition, (People's Ex. No. 1, at 20) buy coal for the building, (People's Ex. No. 5, at 127) and would, at times, refer various subcontractors to Berland. (People's Ex. No. 3, at 121)

Most of these facts petitioner admitted as being true (People's Ex. No. 1, at 20; People's Ex. No. 3, at 121; People's Ex. No. 7, at 468; R. 467) Petitioner's repeated presence around the building was corroborated by the two eyewitnesses, Albert Kyles and Evelyn Mayberry, who also testified at trial that petitioner was at the scene of the fire. Albert Kyles had seen petitioner collect the rent from his aunt who had previously lived in the building at 715 South Lawndale. (R. 111, 128) Kyles had even once paid the rent to petitioner himself. (R. 130) Petitioner admitted that he had possibly collected the rent at 715 South Lawndale as many as ten times. (R. 499) When petitioner collected the rents it was at Berland's request (R. 498-499) Evelyn Mayberry had seen petitioner around 715 South Lawndale on the Sunday, Monday and Tuesday previous to the fire on Wednesday. (R. 141)

The petitioner was so involved with the management of Berland's building that in October, 1969, petitioner filed a suit against Thelma Dillon, a tenant in 715 South Lawndale. (People's Ex. No. 6, at 35; People's Ex. No. 8, at 317; *Wolf* v. *Dillon*, 69 MI 80679 filed October 14, 1979) in his own name on Berland's behalf.

The evidence at trial showed that the building at 715 South Lawndale was a disastrous financial venture. During the two years prior to the fire, Berland's proceeds from the rental property had steadily diminished. In the month prior to the fire, only $250 in rent payments were collected, only 2 of the 4 tenants were paying rent and the building was two-thirds vacant. (People's Exhibit No. 5 at 5, 104)

Berland had attempted to sell the building on contract three times during the two years prior to the fire. For one reason or another every buyer defaulted on the purchase of the building. (People's Exhibit No. 5 at 59-62)

Berland had been cited by the City of Chicago for over 35 building code violations concerning the subject premises. The City of Chicago had asked for a fine of $6,800 or the correction of the code violations. The cause was continued until November 20, 1969, but on November 19, 1969, the day before the scheduled hearing the building was set on fire and burned. (People's Group Exhibit No. 14)

THE FIRE INSURANCE AND THE FRAUDULENT INSURANCE APPLICATION

On June 30, 1969, an application for fire insurance was received by the Illinois Fair Plan Association. The application was submitted on behalf of the Lawndale National Bank, Trust Number 4946, with Albert Berland, listed as the owner of the subject building. Berland listed the value of the property as $125,000 and requested $100,000 worth of coverage. The application contained the question, "give the applicant's five-

year loss record for fire and extended coverage perils." (R. 71) (People's Group Exhibit No. 9) Berland stated on the application that he had no history of fire losses in the five years prior to the application date of the policy. (People's Exhibit No. 10) Since 1967, and prior to the fire in 1969, Berland sustained fire losses on eight separate occasions. (People's Exhibit Nos. 5 at 15, 17, 18, 20, 21, 24, 26, 27, 28) Albert Berland's signature appeared on the policy application. (R. 63-65)

Prior to submitting the application, Berland brought it to the petitioner, to have it notarized. (People's Exhibit No. 8, p. 415). The application was purportedly notarized by Maurice Blumenthal on June 20, 1969 (People's Exhibit No. 9), which was slightly over nine months after Blumenthal's death in an automobile accident. (People's Exhibit No. 13) The statement on the notary license said that it would expire in November of 1970. However, if Blumenthal had lived his license would have expired in February, 1971. (People's Exhibit No. 12)

On August 13, 1969, the American Casualty Company of Reading, Pennsylvania, a member of the Fair Plan Group (R. 66), issued a $100,000 insurance policy on 715 South Lawndale for the period of one year. (People's Ex. No. 9; R. 67-69)

THE ARSON FIRE

Evelyn Mayberry testified that, on the date of the fire, she lived at 716 South Lawndale in an apartment across the street from the subject premises. Two men in a dark colored station wagon pulled up on Lawndale Street going north. They parked on the east side of the street and sat in the car for a while looking up and down the block. It appeared as if they were watching to see if anyone was coming. The man on the driver's side exited and took a gasoline can out of the back of the station wagon. He went into the building at 715 South Lawndale. Then the other individual took a ladder out of the station wagon and also entered the building at 715 South Lawndale.

Mrs. Mayberry identified petitioner, Louis Wolf, as the man who carried the gasoline can into the building. (R. 134-139)

Mrs. Mayberry recognized the first individual, the one who took the gas can out of the automobile, because she had seen him the previous Sunday, November 16, 1969. That day petitioner and another man were parked in the alley just east of her apartment building. She watched him for about five minutes that day but did not know what he was doing. On the Monday prior to the fire, she saw petitioner taking the locks off 715 South Lawndale. Again, he was accompanied by another individual. On Tuesday, Wolf and another man drove by the building two or three times in a dark colored station wagon. (R. 140-141)

Albert Kyles testified that on the morning of November 19, 1969, he was sitting on the front steps of the apartment building, directly across from 715 South Lawndale. He saw two men in a station wagon pull up in front of the building and park across the street from where he was sitting. Both men exited from the car. The driver carried a gas can and the other man went around to the back of the station wagon and took out a ladder. Mr. Kyles saw both men enter the building. In court, Mr. Kyles identified petitioner as the man who was the driver of the car. (R. 105-107) Albert Kyles had seen petitioner collect the rent from his aunt who had previously lived in the building at 715 South Lawndale. (R. 111, 128) Kyles had even once paid the rent to petitioner himself. (R. 130) Petitioner stated that he had possibly collected the rent at 715 South Lawndale as many as ten times. (R. 499)

Petitioner Wolf was carrying the gasoline can and was leaning to one side, as if there was something in the can. The men went into the building and exited a few minutes later. When petitioner came out of the building Mr. Kyles noticed that he was swinging the gas can as if it were empty. The two men got into the car and drove off. (R. 108-109)

After several minutes elapsed Mr. Kyles noticed that there was smoke coming from the building at 715 South Lawndale. The fire department arrived and Mr. Kyles remained at the scene.

After the fire was extinguished, Lieutenant Burns of the Chicago Fire Department entered the premises at 715 South Lawndale. He determined that the fire began in a vacant third floor apartment in the bathroom. The bathroom contained no materials that would sustain combustion. Lieutenant Burns testified that the fire burned downward and said that "heat or fire never burns downward unless there is an outside force of some sort, and in this particular instance it would be an accelerant." (R. 168-169) Lieutenant Burns' extensive testimony showed that the fire was not of natural origin and was caused by an accelerant.

At trial, petitioner presented an alibi defense which the Illinois Supreme Court later characterized as a "recent concoction," and being of "recent origin." The Court held that "The identification was strong and the alibi was impeached." *People* v. *Berland, supra*, 74 Ill.2d at 307. The petitioner stated that on the morning of the fire he was at the offices of his attorney, Samuel Siegel. (R. 489) Three alibi witnesses, Ted Allen, Anton Caithaimer and Samuel Siegel testified that they were with the petitioner at that meeting. As the Illinois Supreme Court said:

> Ted Allen had no recollection of the date of the meeting until he spoke with Wolf, Caithaimer, and Siegel on the day he testified. Siegel had no independent recollection of the meeting until he looked at his appointment calendar, but the calendar did not note a meeting with Wolf on that day. Caithaimer was teaching school when he testified he was meeting with Wolf. Siegel testified contrary to Caithaimer and Allen concerning who had lunch with Wolf. *Berland, supra*, at 306-307

THE ALLEGED SUPPRESSION OF EVIDENCE

The Illinois Supreme Court held that the prosecutor had not suppressed any evidence in the instant case, *Berland, supra*, 74 Ill. 2d 286 at 311-312, and that it was not error to list the same individual, Evelyn Mayberry under two separate names at the same address in the State's answer to discovery. The Illinois Supreme Court held that petitioner Wolf was not deprived of any evidence material to his guilt and was not denied a fair trial. Additionally, the Illinois Supreme Court held that all of the evidence about which the petitioner complains was known or should have been known to the petitioner prior to trial. *Berland, supra*, 74 Ill.2d 286, 314.

The record is replete with examples which show that the petitioner always was aware that Evelyn Mayberry and Elizabeth McGowan were the same individual, and the record also shows that the State complied with discovery procedures.

The facts necessary to show that the petitioner was not prejudiced and that the Illinois Supreme Court properly determined this issue are contained in the argument.

THE TRIAL AND THE APPEAL

The petitioner and Berland were charged with the crime of arson, committed with intent to defraud an insurer, in violation of Illinois Revised Statutes (1969), ch. 38, sec. 20-1(b) of the Criminal Code. They were also charged with conspiracy to commit arson in violation of Illinois Revised Statutes (1969), ch. 38, sec. 8-2. Petitioner, was charged with arson (burning a building without the owner's consent) in violation of Illinois Revised Statutes (1969), ch. 38 sec. 20-1(a). On May 11, 1973, the grand jury returned the indictment (No. 73-1441) in the instant cause. (R. C4-7) Berland and the petitioner hired one private counsel to conduct their defense. During the

presentation of the State's case in chief petitioner procured additional counsel to represent him during the trial. (R. 202) Count one of the indictment charging petitioner with arson, in that he burned a building without the owner's consent, was *nolle prossed* at the close of the State's case-in-chief.

Both Berland and petitioner pleaded not guilty. Petitioner testified and denied his presence at the scene of the fire. Neither Berland nor petitioner sought to establish his defense by implicating the other.

After a bench trial, both the petitioner and Berland were found guilty of arson, with intent to defraud an insurer, and conspiracy to commit arson. A motion in arrest of the judgment on the conspiracy count was granted on the basis that the applicable statute of limitations had expired. The petitioner was represented by new counsel at the extensive argument on the post-trial motions. The petitioner was sentenced to serve a term of 1½ to 4½ years in the Illinois State Penitentiary and was ordered to pay a fine of $10,000.

Following the petitioner's conviction he filed a timely appeal to the Illinois Appellate Court, First District. That court reversed the petitioner's conviction for arson with the intent to defraud an insurer on the basis that petitioner had been denied the effective assistance of counsel due to counsel's alleged conflict of interest, on the basis that the State failed to prove petitioner guilty beyond a reasonable doubt in that credence should have been given to the alibi witnesses and that one of the witnesses had been listed in the list of witnesses under two different names. *People* v. *Berland*, 52 Ill. App. 2d 96, 376 N.E.2d 18, (1st Dist. 1977). rev'd. 74 Ill. 2d 286, 385 N.E. 2d 649 (1979).

Pursuant to the provisions of Illinois Revised Statutes (1977) ch. 110A, sec. 615, the People of the State of Illinois petitioned the Illinois Supreme Court for leave to appeal the judgment of the Illinois Appellate Court, First District. The Illinois Supreme Court granted leave to appeal and reversed

the judgment of the Illinois Appellate Court, First District. *People* v. *Berland*, 74 Ill.2d 286, 385 N.E.2d 649 (1979). In its opinion the Illinois Supreme Court held *inter alia*, that there was no actual conflict of interest in privately retained defense counsel's joint representation of petitioner and his co-defendant, that counsel's representation was competent, that the petitioner was proved guilty of arson with intent to defraud an insurer beyond a reasonable doubt and that the People did not suppress any evidence favorable to the petitioner.

The petitioner filed a petition for rehearing in the Illinois Supreme Court in which he challenged the trial court's dismissal of two petitions for relief under section 72 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, sec. 72) In Illinois, a proceeding pursuant to section 72 is a collateral proceeding "to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and the court at the time of trial, which, if then known, would have prevented the judgment." *Berland, supra*, 74 Ill. 2d 286, at 314. Appeals from the trial court's dismissal of the two section 72 petitions were consolidated with the direct appeal in the Illinois Supreme Court.

The Illinois Supreme Court affirmed the judgment of the trial Court stating that everything the petitioner had raised was presented to the trial court either on the post-trial motions or at the hearings on the two section 72 petitions. Matters considered by the court included petitioner's allegations that certain witnesses at trial had perjured themselves. The Illinois Supreme Court held that the allegations in the petitions and supporting documents and exhibits did not support a charge of perjury and therefore offered no basis for an evidentiary hearing or for reversal.

It is from the decision of the Illinois Supreme Court that the petitioner brings this petition for *certiorari*.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL WAS PRIVATELY RETAINED, THE PETITIONER'S DEFENSE AT TRIAL DID NOT CONFLICT WITH THAT OF THE CODEFENDANT AND THERE IS NO SHOWING THAT A DIFFERENT RESULT WOULD HAVE OBTAINED HAD THE PETITIONER AND THE CODEFENDANT PROCURED SEPARATE COUNSEL. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI.

The petitioner seeks the granting of a writ of certiorari by this Court, and claims that the facts in the instant case would allow resolution of the questions of how strong a showing of conflict of interest must be and the scope of the duty of the trial court in cases where jointly represented defendants have allegedly conflicting interests. (Pet. for Cert. at 12-13) The respondents maintain, however, that the facts in the instant case neither permit the formulation, nor the resolution of either question posed by the petitioner. Moreover, the respondent notes at the outset that a petition for a writ of certiorari is improperly brought upon this basis, for the petitioner has failed to show that the Illinois Supreme Court has decided such a question in a way probably not in accord with applicable decisions of this Court. See, Rule 19(1)(a) of the Supreme Court of the United States. Although the petitioner has completely failed to show the need for this Court, in its sound discretion, to grant his petition, the respondent, believing that the Illinois Supreme Court has properly determined this issue upon the merits will briefly address those merits.

The Illinois Supreme Court in its opinion below in the instant case, held that "a defendant must show actual conflict of interest manifested at trial in order to prevail in a constitutional claim of ineffective assistance of counsel due to joint representation of co-defendants by a single attorney." *People* v. *Berland*, 74 Ill.2d 286, 289, 300, 385 N.E.2d 649 (1979). The petitioner has not shown, and cannot show, that an actual conflict of interest existed under the instant facts.

The indictment returned against the petitioner and his co-defendant consisted of three counts. Only counts one and two are relevant here. Count one charged petitioner, Louis Wolf with arson, in that he burned the apartment building located at 715 South Lawndale, Chicago, without the consent of the owner, in violation of Illinois Revised Statutes (1969) Ch. 38, § 20-1(a). (R. C4) Count two charged both petitioner, Louis Wolf, and Albert Berland, with the crime of arson, committed with the intent to defraud an insurer, (R. C5) in violation of Illinois Revised Statutes (1969) Ch. 38 § 20-1(b). Count one of the indictment, which charged Wolf with burning a building owned by Albert Berland, without his consent, was *nolle prossed* on the People's motion at the close of the People's case when the court stated that it would preclude proof on both counts one and two. (R. 321) The petitioner and his codefendant were convicted on count two of the indictment which charged them with arson with intent to defraud an insurer. Petitioner and his codefendant were represented at trial by one privately retained counsel. Additional counsel was hired by the petitioner and entered his appearance during the presentation of the State's case in chief. New, privately retained counsel represented the petitioner during the post-trial motions and on appeal.

The Illinois Supreme Court held that the record in the instant case was "devoid of any evidence of an actual conflict of interest." *Berland, supra,* 74 Ill. 2d at 300. The respondent submits that the Illinois Supreme Court was clearly correct.

Wolf's defense was that he was not present at 715 South Lawndale at the time the crime occurred. He stated that he did not know about the fire until several days to a week after the loss. (R. 489) Petitioner Wolf presented an alibi defense to

show that he was at the law office of Mr. Samuel Siegel on the morning of the fire. Berland did not present an alibi defense and the trial court acknowledged that there was no evidence showing Berland's presence at the scene of the fire. Berland's defense was basically one of denial and he presented testimony in an attempt to show that the building was not over insured in an effort to negate the prosecution's evidence of motive. Clearly, there was no conflict in these defenses and neither defendant sought to implicate the other. *People* v. *Somerville*, 42 Ill.2d 1, 9, 245 N.E.2d 461 (1969); *People* v. *Craig*, 47 Ill. App.3d 242, 361 N.E.2d 736 (1st Dist. 1977).[2]

The petitioner speculates that defense counsel's representation of him was hampered because of privately retained counsel's representation of the codefendant. The Illinois Supreme Court has specifically rejected creating a "conflict of interest out of mere conjecture as to what might have been shown." *People* v. *Somerville*, 42 Ill. 2d 1, 245 N.E.2d 461 (1969).[3]

In the instant case, neither Berland nor petitioner was attempting to establish his defense by implicating the other. Moreover, there was no reason to assume that petitioner would ever try to show that Berland burned the building had he been represented by different counsel or even if he had been tried separately. The evidence clearly did not show that Berland was present at the scene of the fire, as the trial judge acknowledged.

There is absolutely no reason that can be inferred from any testimony as to why petitioner would burn the building without

[2] In this brief in the Illinois Supreme Court, petitioner Wolf conceded that the defenses presented at trial *were not antagonistic*. (Brief for Defendant Wolf, at 44, Ill. Sup. Ct. Docket No. 50012)

[3] In *United States* v. *Steele*, 576 F.2d 111 (6th Cir. 1978), the sixth circuit court of appeals declined to adopt a *per se* rule under the sixth amendment requiring jointly represented defendants to be advised of their right to separate counsel in cases where, as here, joint counsel was privately retained.

Berland's consent. For petitioner to have taken such an action is out of the question. He testified that he had been friends with Berland for over thirty years. There is no evidence that they had any type of disagreement, or that Berland owed petitioner any money. Clearly, any allegation of conflict of interest is pure speculation. Their defenses did not conflict with one another.

The Illinois Supreme Court's position in *Somerville*, *supra*, of refusing to reverse a conviction because of speculation to what might have been, has been followed by a number of Federal Circuit Courts of Appeals. *United States* v. *Medel*, 592 F.2d 1305 (5th Cir. 1979); *United States* v. *Steele*, 576 F.2d 111 (6th Cir. 1978) cert. den. 99. S.Ct. 313; *United States* v. *Mandell*, 525 F.2d 671 (7th Cir. 1975) cert. den. 423 U.S. 1049; *Smith* v. *Regan*, 583 F.2d 72 (2d Cir. 1978); *United States* v. *Eaglin*, 571 F.2d 1069 (9th Cir. 1977) cert. den. 435 U.S. 406. *United States* v. *Valenzuela*, 521 F.2d 414 (8th Cir. 1975) cert. den. 424 U.S. 916 (1976).

Moreover, the petitioner's cause was advanced by counsel without sacrificing his interests in favor of the codefendant before trial, during the prosecution's case in chief, and during the defense case in chief. Counsel conducted a pre-trial investigation, filed and argued pre-trial motions, made objections to various exhibits, argued points of law, cross-examined the State's witnesses and presented a defense. The petitioner cannot and does not point to anything in the cross-examination of the State's eyewitnesses or any witnesses which would show that petitioner's interests were sacrificed in favor of the codefendant.

Additionally, during the presentation of the State's case in chief petitioner Wolf hired a second attorney. (R. 259) At the conclusion of the State's case in chief the State *nolle prossed* Count One of the indictment. When the defense presented its case the only count on which the co-defendant and the petitioner were being tried was Count Two.

The respondent submits that the instant case is precisely the type of case where a joint representation is more effective for the defendants. As the Court of Appeals said in *United States* v. *Medel, supra,* 592 F.2d 1305, 1312 (5th Cir. 1979), "when the parties' interests were so closely related, if either had suggested that the other party was guilty, then this allegation might have worked to the detriment of the accusing party." As Mr. Justice Frankfurter said in his dissent in *Glasser* v. *United States,* 315 U.S. 60, 92, 62 S.Ct. 457, 86 L.Ed. 680 (1942), quoted approvingly in *Holloway* v. *Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed2d 426 (1978), "Joint representation is a means of ensuring against reciprocal recrimination. A common defense often gives strength against a common attack." This Court in *Holloway* clearly enunciated that, "Requiring or permitting a single attorney to represent co-defendants, . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway supra,* 435 U.S. at 482.

The Illinois Supreme Court extensively discussed both the holdings in *Glasser* v. *United States, supra,* and *Holloway, supra,* in their opinion in *Berland, supra.*

> The court has refused an invitation to require trial judges to ascertain that co-defendants' decisions to proceed with one attorney are informed (*People* v. *Somerville* (1969), 42 Ill. 2d 1,10). The crucial determination is whether there is a conflict, since absent such conflict there is no threat to a defendant's right to the assistance of separate counsel. Neither *Glasser* v. *United States,* (1942), 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457, nor *Holloway* v. *Arkansas,* (1978), 435 U.S. 475, 55 L.Ed. 2d 426 98 S.Ct. 1173, indicate that a pretrial inquiry and waiver of separate counsel is mandated in all cases of joint representation. Because joint representation is not per se unconstitutional there is no need to require judicial inquiry until the conflict appears. The language in *Glasser* and *Holloway* that it is the duty of the trial judge to see that the trial is conducted with solicitude for the essential rights of the accused is directed specifically to trial court insistence upon joint representation where counsel or the defendant has requested separate representation. Since there was no conflict here, judicial inquiry was not required. *Berland,* at 305.

There was no objection to joint representation voiced by privately retained counsel nor by the petitioner or his codefendant in the instant case and there was no actual conflict. The facts of the instant case, therefore, do not fall within the ambit of *Holloway* v. *Arkansas, supra,* and render *Holloway* inapplicable to the case at bar. See *Thacker* v. *Bordenkircher,* 590 F.2d 640 (6th Cir. 1979).

The petitioner urges that this Court grant a writ of certiorari to determine whether it is a *per se* violation of the Sixth Amendment to permit joint representation of codefendants in the absence of an inquiry or an admonishment by the trial court. (Pet. for Cert. at 15-16) He also inquires as to what degree of prejudice must be demonstrated by a defendant to show that his Sixth Amendment rights have been violated. Neither the formulation nor the resolution of this question are allowed by the facts of this case. The petitioner cannot show, in any way, that he was prejudiced by counsel's joint representation of him and his codefendant or that an actual conflict existed.

As support for his position the petitioner relies on *United States* v. *Waldman,* 579 F.2d 649 (1st Cir. 1978) and states that *Waldman* holds that the "failure of the judge to adequately alert the defendant to the dangers of joint representation is *per se* violative of the Sixth Amendment." (Pet. at 15-16) Yet, *Waldman* does not so hold. The decision in *Waldman,* which was handed down subsequent to another First Circuit case, *United States* v. *Foster,* 469 F.2d 1 (1st Cir. 1972), cited in *Waldman,* was decided as was *Foster,* pursuant to that circuit's supervisory powers, *Waldman, supra,* at 652, rather than being founded on constitutional grounds. In a footnote (Pet. at 16) the petitioner, citing *Waldman,* and *United States* v. *Donohue,*

560 F.2d 1039 (1st Cir. 1977), quotes that portion of the opinion which deals with the type of inquiry required by the trial judge in joint representation situations in the First Circuit. The respondent notes, however, that the *Waldman* Court went on to say,

> [W]e do not think that any specifics of the form a court's inquiry concerning a defendant's waiver of separate counsel would rise to the level of a constitutional right.... [W]e view *Donahue* as merely expanding a supervisory rule,... *Waldman* at 652.

The Court affirmed Waldman's conviction.

Additionally, the First Circuit has stated that it does *not* follow a rule of *per se* reversal. *United States* v. *Foster, supra,* 469 F.2d (1st Cir. 1972). A number of the Circuit Courts of Appeal have declined to exercise their supervisory powers and implement an affirmative inquiry requirement on the trial court. *United States* v. *Mandell, supra,* 525 F.2d 671 (7th Cir. 1975) (cert. den. 423 U.S. 1049) and the cases cited therein at 676.

As the Court of Appeals said in *United States* v. *Mandell, supra,* 525 F.2d 671 (7th Cir. 1975) cert. den. 423 U.S. 1049, "the primary responsibility for the ascertainment and avoidance of conflict situations must lie with the members of the bar. Accord, *United States* v. *Paz-Sierra,* 367 F.2d 930, 932-933 (2d Cir. 1966); *United States* v. *Boudreaux,* 502 F.2d 557 (5th Cir. 1974). This Court in *Holloway* v. *Arkansas, supra,* held that "an attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." 98 S.Ct. 1173 at 1179.

For all of the above stated reasons, the respondent urges that because the Illinois Supreme Court properly decided this issue on the merits, because the decision of the Illinois Supreme

Court is in accord with the decisions of this Court, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of Certiorari, such petition should be denied.

II.

THE PROSECUTION'S DISCLOSURE OF THE IDENTITY OF THE A STATE'S WITNESS UNDER TWO DIFFERENT NAMES AT THE SAME ADDRESS COMPLIED WITH THE ILLINOIS DISCOVERY RULES AND THIS COURT'S DECISION IN *BRADY* v. *MARYLAND,* ESPECIALLY WHERE THE RECORD SHOWS THAT THE DEFENSE ALWAYS KNEW THE IDENTITY OF THE WITNESS. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR CERTIORARI.

The petitioner also prays for the granting of a writ of certiorari by this Court on the basis that the prosecution allegedly suppressed the identity of an eyewitness, Evelyn Mayberry, who was also known as Elizabeth McGowan, by causing her to be listed under both names, at the same address, in the State's answer to discovery. The petitioner claims that he did not learn of this evidence until after trial and had he known that Mayberry and McGowan were the same person he could have impeached the witness with a prior, allegedly inconsistent, statement. He also alleges that Mayberry's testimony was perjured and that the State knowingly condoned the use of this allegedly perjured testimony. In answer, the respondent maintains that a petition for a writ of certiorari is improperly brought upon this basis, for the petitioner has failed to show that the Illinois Supreme Court has decided a federal question of substance not theretofore determined by this Court or that the Illinois Supreme Court has decided such a question in a way probably not in accord with the applicable decisions of this Court. See Rule 19(1)(a) of the Supreme Court of the United

States. Although the petitioner has failed to show the need for this Court, in its sound discretion, to grant his petition, the respondent, confident that the Illinois Supreme Court has properly determined this issue will briefly address the merits.

In summary, the respondent maintains (1) that in supplying the list of witnesses to the petitioner both the Illinois Supreme Court Rules on Discovery and the dictates of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), were complied with and no evidence was suppressed (2) that the petitioner always knew that Evelyn Mayberry and Elizabeth McGowan were the same person (3) that it was clear that petitioner did have the witness' prior statements at trial and attempted to impeach her with them at trial (4) that there was no material inconsistency in the witness' testimony (5) that another eyewitness corroborated the witness (6) and that there was absolutely no evidence of perjury on the part of the State's witnesses anywhere in the record. The Illinois Supreme Court in its opinion considered all points raised here by the petitioner and correctly resolved the issue against the petitioner.

The respondent submits that the petitioner was always aware of the fact that the witness had been listed under both names, at the same address, on the State's list of witnesses and that doing so was an unintentional act which occurred as result of the State's desire to completely comply with discovery requirements. Ill. Rev. Stat. 1973, Ch. 110A § 412. It is clear that the dual listing of the names was an act from which no harm flowed. It is also obvious that defense counsel knew about, and intended to utilize the witness' prior statements to impeach her. During the trial of the instant case, defense counsel on cross-examination, attempted to impeach Evelyn Mayberry by asking her the following question: Did you ever tell anyone that you saw a man walk in there with a mop bucket? (R. 147) The only time Mrs. Mayberry stated that she saw a man carrying a bucket was in the original police report

where, in describing the incident, she was erroneously identified as Elizabeth "McGowan" rather than as Evelyn, wife of Roosevelt McGowan. (R. C116; Pet. Post Trial Ex. No. 2)

An Illinois Bureau of Investigation report of a March 19, 1971, interview with Evelyn Mayberry was also made available to the defendant. (R. C123-4; Pet. Post-Trial Ex. No. 3) and the fact that she had been interviewed was even brought out by defense counsel during his cross-examination of her. (R. 148-149) In that report Evelyn Mayberry was identified as the common-law wife of Roosevelt McGowan. The account given by Evelyn Mayberry to the investigator for the Illinois Bureau of Investigation was substantially the same as the account given by her in the original police report where she was erroneously identified as Elizabeth rather than Evelyn. She said she saw two white male subjects enter 715 South Lawndale, one of whom was carrying an aluminum can. She then stated that she left for the store. (R. C116, 123-4, Pet. Post-Trial Exhibit Number 2)

At the civil trial in Federal District court where the fire insurance claim was litigated Evelyn Mayberry testified that she saw two men park a black station wagon in front of 715 S. Lawndale. She saw them go into the building and one of the men was carrying a can. Then she went grocery shopping. (Pet. Post-Trial Ex. No. 4 at 56-57) At that trial she identified herself as Mrs. Roosevelt McGowan, not as Elizabeth. (Pet. Post-Trial Ex. No. 4 at 55) During her testimony she said that Mr. McGowan was her husband. (Pet. Post-Trial Ex. No. 4, at 76)

In addition, Mrs. Mayberry, testifying in federal court under the name, Mrs. Roosevelt McGowan, stated on cross-examination, that on the evening of November 19, 1969, the police had brought a man in a car in front of their house to see if her husband, Roosevelt McGowan could identify him. (Pet. Post-Trial Ex. 4 at 71-73) This same information is contained in

Evelyn Mayberry's statement to the Illinois Bureau of Investigation. (R. C 124) In that statement in which she is described as being the common-law wife of Roosevelt McGowan, she states that the police came for Roosevelt McGowan. They asked him to "go out to the car with them." She did not know if he identified anyone at that time. (R. C 124)

Prior to the trial in Federal District court, Mr. Roosecelt McGowan was deposed. When he was asked what his wife's name was, he said it was *Evelyn*, (Pet. Post-Trial Ex. No. 7 at 3; R. 700) He also stated that his wife left for the store before the fire started. (Pet. Post-Trial Ex. at 14) At the trial of the instant cause she used her previous name, Evelyn Mayberry, rather than McGowan. (R. 124) Again, her story was substantially the same one she recounted on previous occasions. She saw two men drive up to the front of 715 South Lawndale. One man carried a gas can and they both entered the building. Then she left for the store. (R. 136-139)

On September 28, 1973, approximately three months prior to the instant trial, a defense investigator interviewed Evelyn Mayberry when she was in the hospital suffering from a gall bladder condition. (R. 825-826, 840-841, 861-862) This interview, made part of the record during the argument on the petitioner's post-trial motions (R. 826, 861-862), demonstrates that a defense investigator saw and spoke to Evelyn Mayberry in the hospital and made a written report of this to defense counsel. Certainly, the knowledge of the defense investigator is attributable to the defense attorney, as the knowledge of a police officer is attributable to a prosecutor. *People* v. *Marlin*, 46 Ill. 2d 565, 264 N.E. 2d 147 (1970).

In short, Evelyn Mayberry never claimed at any time to be Elizabeth McGowan. Apparently, when she and her common-law husband, Roosevelt McGowan, were first interviewed by the police her name was erroneously listed as Elizabeth rather

than Evelyn. (R. C116) The only time she used the last name of McGowan was during the civil trial in Federal District Court and then she was known as Mrs. Roosevelt McGowan, not as Elizabeth. (Pet. Post-Trial Ex. No. 4 at 55) In the other documents, which were exhibits in the instant case, she is referred to as Evelyn Mayberry, the common-law wife of Roosevelt McGowan (R. C123-4), or as McGowan's wife Evelyn (Pet. Post-Trial Ex. No. 7 at 4), not Elizabeth. Both names appearing on the list of witnesses contained the same address, 716 Lawndale.

The petitioner always possessed the federal trial transcript, knew that Mrs. McGowan was in fact Evelyn Mayberry, and could see, by examing the two transcripts that her testimony in the instant case was very similar to her testimony at the federal trial.

The Illinois Supreme Court found on the aforementioned facts that no suppression of evidence occurred in the instant case, hence, the dictates of *Brady* v. *Maryland, supra*, 373 U.S. 83, were not violated. The Illinois Supreme Court also held that in no way was petitioner deprived of any evidence material to his guilt under *United States* v. *Agurs*, 427 U.S. 97, 49 L.Ed.2d 343, 96 S.Ct. 239 (1976). *People* v. *Berland, supra*, 74 Ill.2d at 311-312. The respondent maintains that the opinion of the Illinois Supreme Court is unequivocally correct.

The petitioner also contends that the dual listing of witness Mayberry was done intentionally by the prosecution in an attempt to mislead him. There is not one iota of evidence in this record to support this contention. In fact the record supports only the opposite conclusion. When new, substitute defense counsel appeared and raised this contention during the arguments on the post-trial motion the prosecutor stated, "I ask the Court and say to the Court, that it was not done in any intentional fashion." (R. 845)

The petitioner's final accusation is that the State knowingly used perjured testimony to obtain his conviction. The respondent maintains and the Illinois Supreme Court held, that the record does not lend any credence at all to the petitioner's assertion. *Berland, supra,* 74 Ill.2d at 316. The petitioner raised this argument in the post-trial motions, on the direct appeal, in a collateral attack on the conviction (Ill. Rev. Stat. 1975, 110 § 72: (*coram nobis*) and in the subsequent appeal of the denial of the collateral attack. His arguments were repeatedly rejected by the trial court and then totally rejected again by the Illinois Supreme Court.

While Evelyn Mayberry testified at the federal insurance trial that she was unable to see the faces of the two men who exited the station wagon on the morning of the fire, she did testify that she had previously seen both of them and the vehicle. She positively identified the petitioner as the man she saw driving the station wagon on several occasions prior to the fire, specifically on the Monday before it occurred. (Pet. Post-Trial Ex. No. 4, at 58-59) She identified Defendant's Exhibit No. 12 at the federal trial, a picture of Wolf, as depicting the driver of the station wagon (Pet. Post-Trial Ex. 4 at 60), which pulled up in front of 715 South Lawndale.

At the trial of the instant case she was never asked if she had been able to see the faces of the two men. She did positively identify the petitioner as the driver of the car, who then exited the car and walked into the building with a gasoline can on the morning of the fire. It is clear that a person can be identified by his general appearance at the time of the crime. *People* v. *Oswald,* 26 Ill.2d 567, 187 N.E. 2d 685 (1963). Additionally, when Mayberry's testimony in the civil trial is examined it is substantially the same testimony she gave in the trial of the instant case. It is axiomatic that the credibility of witnesses is a matter for the trier of fact to determine. The law is also clear that "mere conflicts in the testimony of a witness

with prior statements made by him "does not establish that the witness has given perjured testimony." *People* v. *Henderson,* 36 Ill. App.3d 355, 344 N.E.2d 239 (1st Dist. 1976); accord, *People* v. *Lagios,* 39 Ill.2d 298, 235 N.E.2d 587 (1968). Clearly, any possible inconsistencies in the testimony were minor and it is clear that there is not one iota of perjury on this record.

A fact that the petitioner conveniently ignores is that Evelyn Mayberry was not the only eyewitness to identify the petitioner at the scene of the fire. Albert Kyles was also an eyewitness and he knew the petitioner having seen him on previous occasions. On the day of the fire, when petitioner was observed by Kyles, Kyles already knew who he was. Kyles' previous acquaintance with petitioner made his identification strong, positive and credible. Kyles clearly corroborated Mayberry's identification.

The prosecution obviously had no duty to point out that Mayberry's testimony was false where in fact her testimony was positive and credible. See *Napue* v. *Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Clearly, there was no perjured testimony used to obtain the petitioner's conviction.

The decision of this Court in *United States* v. *Agurs, supra,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 343 (1976), is of no aid to the petitioner. As this Court said in *Agurs,* "The prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 96 S.Ct., at 2399. The *Agurs* Court also held that "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 2400.

There was no information in the instant case that was not disclosed to the petitioner, *a fortiori* there was nothing unknown which was favorable to the defendant (*Brady, supra*) or which would have affected the outcome of the trial.

For all of the above stated reasons, the respondent urges that because the Illinois Supreme Court properly decided this issue on the merits, because the decision of the Illinois Supreme Court is in accord with the decisions of this Court, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of Certiorari, such petition should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
DONALD B. MACKAY,
MELBOURNE A. NOEL, JR.
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570,
Attorneys for Respondent.

BERNARD CAREY,
State's Attorney of Cook County, Illinois,
500 Richard J. Daley Center,
Chicago, Illinois 60602
(312) 443-5496
MARCIA B. ORR,
JOAN S. CHERRY,
Assistant State's Attorneys,
Of Counsel.